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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10
11 Plaintiff,

12 v.

13 Mustaf Adan Arale,
14 aka Mohammed Abdirahman Osman,
15 Defendant.

No. CR-18-01584-TUC-RM (BGM)

REPORT AND RECOMMENDATION

16 Currently pending before the Court is Defendant Mustaf Adan Arale's Motion to
17 Suppress Involuntary Statement (Doc. 62). The Government has filed its response, and
18 there was no reply. Govt.'s Response to Def.'s Mot. to Suppress Involuntary Statement
19 (Doc. 73). Defendant Arale is charged with five (5) counts of making a false statement
20 under oath in an immigration matter, in violation of Title 8, United States Code, Section
21 1546(a); two (2) counts of making false statements to a Department or Agency of the
22 United States, in violation of 18 U.S.C. § 1001(a)(2); and one (1) count of aiding and
23 abetting false statements to a Department or Agency of the United States, in violation of
24 18 U.S.C. §§ 1001(a)(2) & 2. Indictment (Doc. 3). Defendant Mustaf Adan Arale seeks
25 suppression of his statements because they were allegedly involuntary. *See* Def.'s Mot.
26 to Suppress (Doc. 62) at 9–13.

27 Pursuant to LRCrim. 5.1, this matter came before Magistrate Judge Macdonald for
28 an evidentiary hearing and a report and recommendation. On February 27, 2019, an
evidentiary hearing was held before Magistrate Judge Macdonald regarding the motion.

Minute Entry 2/27/2019 (Doc. 88). Subsequently, Defendant filed his Supplemental Authorities in Support of Motion to Suppress Involuntary Statement (Doc. 96) and the Government filed its Response (Doc. 97). This matter is now ripe for adjudication. The Magistrate Judge recommends that the District Court, after its independent review, deny Defendant's motion.

I. FACTUAL BACKGROUND

On May 24, 2017, Federal Bureau of Investigation ("FBI") Special Agent ("SA") Benjamin T. Trentlage was assigned to the Joint Terrorism Task Force ("JTTF") in Tucson, Arizona. Hr'g Tr. 2/27/2019 (Doc. 95) at 14:24–15:8, 17:21–24. SA Trentlage has been employed with the FBI for approximately nine (9) years and assigned to the JTTF for approximately eight (8) years. *Id.* at 15:3–8, 73:13–14. SA Trentlage testified that the JTTF investigates terrorism and national security matters. *Id.* at 15:9–11. SA Trentlage further testified that one of the terrorist organization that the JTTF is tasked with investigating is al-Shabaab. *Id.* at 15:12–14, 20:9–11. SA Trentlage described al-Shabaab as the primary terrorist group active in East Africa in countries such as Somalia and the area surrounding it. *Id.* at 20:12–18. SA Trentlage further testified that al-Shabaab's predecessor, the Islamic Courts Union, controlled major portions of Somalia for a significant amount of time. Hr'g Tr. 2/27/2019 (Doc. 95) at 20:12–18.

SA Trentlage is one of the case agents assigned to Mr. Osman's case. *Id.* at 15:15–17, 37:7–9. SA Trentlage confirmed that the charges in the indictment stem from allegations that Mr. Osman made materially false and fraudulent statements to the United States Citizenship and Immigration Services in connection with several applications that he submitted. *Id.* at 16:1–6. SA Trentlage further confirmed that these applications included a registration for classification as a refugee ("I-590") and an application for permanent resident status ("I-485"). *Id.* at 7–15. SA Trentlage also confirmed that Mr. Osman submitted written applications, as well as participated in an oral interview. *Id.* at 16–19. Among the misrepresentations that Mr. Osman allegedly made were giving a

1 false name of Mustaf Adan Arale; stating that he was from Somalia; that his father's
2 name was Adan Arale Omar, born in Somalia; denying that he ever used any other
3 names; denying that he was personally acquainted with anyone who had been involved
4 with a foreign terrorist organization or insurgent group; denied ever having been
5 affiliated with a rebel or insurgent group or organization; and that he had been injured in
6 an attack by al-Shabaab at the Bakaara Market in Somalia in June 2010. *Id.* at 16:20–
7 17:20.

8 **A. Search Warrant Execution**

9 On May 24, 2017, the FBI obtained and executed a search warrant on Mr.
10 Osman's home that he shared with his wife and children. Hr'g Tr. 2/27/2019 (Doc. 95) at
11 17:21–25:2. SA Trentlage testified that a variety of items, including identification
12 documents, such as passports or ID cards, and electronic devices, such as cellular
13 telephones and tablets, were seized during the search. *Id.* at 18:3–9. SA Trentlage
14 further testified that at various times following execution of the search warrant, agents
15 returned property to the defendant. *Id.* at 18:10–12. He explained that items were
16 returned if it was determined that the item was not of evidentiary value, or if the item had
17 been forensically examined and the original device was no longer needed. *Id.* at 18:10–
18 17.

19 **B. Return of Evidence**

20 On June 22, 2017, FBI SA Jon Edwards was assigned to the JTTF in Tucson,
21 Arizona. Hr'g Tr. 2/27/2019 (Doc. 95) at 6:5–11. SA Edwards has been employed with
22 the FBI for approximately eighteen (18) years and assigned to the JTTF for
23 approximately four and a half (4 1/2) to five (5) years. *Id.* at 6:7–13.

24 At approximately 2:30 p.m. on June 22, 2017, SA Edwards and SA Ian
25 Cruikshank of the Department of Homeland Security ("DHS") Homeland Security
26 Investigations ("HSI") returned items of evidence seized during the execution of a search
27 warrant to Defendant Osman. *Id.* at 7:2–14, 12:1–4. SA Edwards testified that he and
28 SA Cruikshank went to Mr. Osman's residence to return the items. *Id.* at 7:2–16. SA

1 Edwards further testified that during that visit, he and SA Cruikshank spoke with Mr.
2 Osman for approximately thirty (30) minutes. *Id.* at 7:17–24. SA Edwards also testified
3 that Mr. Osman appeared to understand English and did not ask for an interpreter. Hr’g
4 Tr. 2/27/2019 (Doc. 95) at 7:25–8:12. SA Edwards testified that he and SA Cruikshank
5 were returning a cellular telephone, as well as retrieving a recovery key for another
6 electronic device, which SA Edwards believed to be a tablet. *Id.* at 8:13–17, 11:6–20.
7 SA Edwards testified that during the time Mr. Osman was filling out the receipt for the
8 return of property or while they were discussing the recovery key, Mr. Osman stated that
9 he was worried about the investigation, and that he had lied to Immigration. *Id.* at 8:18–
10 9:4, 12:5–23. SA Edwards mentioned to Mr. Osman that there were important issues that
11 the FBI would like to talk to him about. *Id.* at 9:5–13. SA Edwards testified that these
12 issues included potential terrorism cases that Mr. Osman might have knowledge about
13 overseas or here in the United States. *Id.* at 9:14–16. SA Edwards further testified that
14 Mr. Osman was not in custody during the meeting, and appeared concerned and sincere
15 regarding his worry. Hr’g Tr. 2/27/2019 (Doc. 95) at 9:17–20, 10:12–15. SA Edwards
16 also indicated that he was not surprised by Mr. Osman’s admission, noting it was
17 consistent with the environment and what was happening. *Id.* at 13:25–14:5. SA
18 Edwards explained that any knowledge that Mr. Osman may have regarding possible
19 connections to terrorism would have been of interest to the FBI for intelligence reasons.
20 *Id.* at 10:2–11. SA Edwards testified that neither he nor SA Cruikshank questioned Mr.
21 Osman regarding the facts of the instant case, and that any questioning was limited to the
22 recovery key. *Id.* at 10:16–23. SA Edwards further testified that there were no promises
23 made to Mr. Osman during this meeting. *Id.* at 13:2–13.

24 ***C. The Interview***

25 On June 27, 2017, SA Trentlage and SA Cruikshank returned to Mr. Osman’s
26 home for an interview. Hr’g Tr. 2/27/2019 (Doc. 95) at 19:1–20, 37:15–18. SA
27 Trentlage testified that they were interested in what Mr. Osman wanted to tell them, and
28 hoped that he would provide information regarding al-Shabaab activity either in the

1 United States or abroad. *Id.* at 19:21–20:8. SA Trentlage further testified that prior to
2 this date, the FBI had information that Mr. Osman had been connected with al-Shabaab.
3 *Id.* at 20:19–22. SA Trentlage explained that the FBI had received information from
4 foreign partners that indicated that Mr. Osman’s brother, uncle, and aunt had all been
5 convicted in absentia in Somaliland for their connection to a bombing attack in Djibouti.
6 *Id.* at 20:23–21:6. SA Trentlage also testified that two of those relatives, including Mr.
7 Osman’s brother, remain fugitives. *Id.* at 21:7–10.

8 SA Trentlage testified that he and SA Cruikshank knocked on the door of Mr.
9 Osman’s residence, he invited them in, and they sat down and began to talk. Hr’g Tr.
10 2/27/2019 (Doc. 95) at 21:11–15. SA Trentlage further testified that only he and SA
11 Cruikshank were present, and they were wearing business casual plainclothes, their
12 firearms were not visible, and they did not have visible handcuffs. *Id.* at 21:18–22:7. SA
13 Trentlage also testified that it was his understanding that Mr. Osman had invited the
14 agents to his home and confirmed that Mr. Osman did not appear surprised when he and
15 SA Cruikshank appeared and welcomed them both in. *Id.* at 22:8–15. SA Trentlage
16 identified Defendant Osman as the individual who was present at the June 27, 2019
17 meeting. *Id.* at 22:16–23.

18 SA Trentlage testified that both he and SA Cruikshank carried audio recorders and
19 recorded the conversation. *Id.* at 22:25–23:4, 29:6–9, 38:18–24. SA Trentlage further
20 testified that a review of the transcript from that recording appeared accurate. Hr’g Tr.
21 2/27/2019 (Doc. 95) at 23:5–21; *see also id.* at 38:25–39:2. The interview started with
22 SA Cruikshank indicating that the reason the agents were there was due to his prior
23 interaction with Mr. Osman and Mr. Osman’s statement that he had lied to Immigration
24 and wanted to talk. *Id.* at 24:5–11. SA Trentlage testified that he and SA Cruikshank
25 advised Mr. Osman that he was welcome to ask any questions. *Id.* at 24:12–15. SA
26 Trentlage further testified that at the time of the interview, Mr. Osman was not under
27 arrest or charged with a crime. *Id.* at 24:16–20. SA Trentlage also testified that Mr.
28 Osman brought up the Miranda advisement, which he had been given when the search

1 warrant was executed. *Id.* at 24:25–25:14, 39:7–41:9. SA Trentlage testified that he and
2 SA Cruikshank again advised Mr. Osman of his Miranda rights and reiterated that those
3 rights applied to Mr. Osman during the interview. Hr’g Tr. 2/27/2019 (Doc. 95) at 25:3–
4 23, 39:7–41:9.

5 SA Trentlage confirmed that Mr. Osman spoke and appeared to understand
6 English. *Id.* at 25:24–26:2. SA Trentlage further testified that he did not recall Mr.
7 Osman asking for clarification or an interpreter, and SA Trentlage did not have any
8 problems understanding him. *Id.* at 26:3–8. SA Trentlage also testified that Mr. Osman
9 did not appear fearful of the agents, but did ask them for some kind of guarantee or
10 promise that he would receive lesser charges. *Id.* at 26:13–27:7, 54:21–55:13, 61:2–16.
11 SA Trentlage testified that the issue of a guarantee seemed important to Mr. Osman, and
12 the agents responded that the only guarantee or promise that they could make was that if
13 he was honest with them, they would relay that information to the prosecutor. *Id.* at
14 27:4–22, 29:19–30:1, 46:15–25, 47:17–49:10, 52:8–53:17, 55:3–57:3, 61:2–62:1, 73:18–
15 25. SA Trentlage confirmed that SA Cruikshank indicated to Mr. Osman that there was a
16 prosecutor assigned to his case, and that SA Cruikshank had been in touch with her. Hr’g
17 Tr. 2/27/2019 (Doc. 95) at 53:18–54:17. SA Trentlage further testified that he recalled
18 telling Mr. Osman that honesty was well regarded in the United States’ legal system an
19 that people who were honest usually had better legal outcomes than those who were not.
20 *Id.* at 27:23–28:3, 62:17–63:16, 77:7–16. SA Trentlage acknowledged that SA
21 Cruikshank had promised that if Mr. Osman was honest with the agents, SA Cruikshank
22 would tell the prosecutor that the information obtained was more important than the
23 immigration charges. *Id.* at 57:12–58:20, 62:2–16, 71:3–20. SA Trentlage also
24 confirmed that SA Cruikshank indicated that he could not make any guarantees, but could
25 make recommendations to the prosecutor. *Id.* at 59:1–12, 70:8–71:13, 74:16–23, 75:7–
26 76:12. SA Trentlage testified that he spoke to Mr. Osman about the desirability of
27 developing trust between the JTTF and Mr. Osman, as well as suggesting that if Mr.
28 Osman assists them, it might be possible to meet with the prosecutor regarding the

1 immigration charges. *Id.* at 59:13–61:1.

2 SA Trentlage confirmed that SA Cruikshank indicated to Mr. Osman that he had
3 the opportunity to tell the agents what they hoped to know; information which related to
4 intelligence matters that were more important to the agents than the immigration charges.
5 Hr’g Tr. 2/27/2019 (Doc. 95) at 40:20–43:11, 66:24–67:8. SA Trentlage agreed that Mr.
6 Osman was primarily concerned with his family and his possible criminal exposure and
7 possible immigration problems. *Id.* at 43:12–14, 43:19–44:18, 67:14–68:7. SA Trentlage
8 confirmed that SA Cruikshank indicated to Mr. Osman that in order for there to be any
9 possibility for his family to stay in the United States, Mr. Osman needed to have a
10 conversation with the agents. *Id.* at 63:20–66:2, 78:17–79:5. SA Trentlage testified that
11 Mr. Osman distinguished the agents from Somali security forces and acknowledged that
12 the immigration charges would continue even if he helps the agents in the long-term. *Id.*
13 at 44:19–45:12.

14 SA Trentlage testified that he wanted Mr. Osman to give him information, and
15 hoped that the information would include what Mr. Osman meant about his previous lie
16 to Immigration, as well as information regarding al-Shabaab and its operatives and
17 activities. *Id.* at 28:4–17, 28:25–29:5. SA Trentlage further testified that he and SA
18 Cruikshank knew that Mr. Osman had some connection with al-Shabaab and viewed him
19 as someone who could provide information regarding the same. Hr’g Tr. 2/27/2019
20 (Doc. 95) at 28:18–24. SA Trentlage also testified that he and SA Cruikshank talked to
21 Mr. Osman about the fact that they were all part of the same community, and the agents
22 were just trying to keep the community safe. *Id.* at 68:20–69:20. SA Trentlage testified
23 that Mr. Osman decided that he wanted to speak with the agents. *Id.* at 29:10–18. SA
24 Trentlage testified that they began the interview by asking Mr. Osman his name. *Id.* at
25 30:7–9. Mr. Osman stated that his birth name was Mohamed Abdirahman Osman. *Id.* at
26 30:10–17. SA Trentlage testified that throughout Mr. Osman’s immigration documents,
27 however, he used the name Mustaf Adan Arale. Hr’g Tr. 2/27/2019 (Doc. 95) at 30:18–
28 20. SA Trentlage further testified that Mr. Osman stated that Adan Arale was a friend he

1 knew while living in Mogadishu, who took him to the hospital when Mr. Osman was
2 injured, but provided his own name on the hospital paperwork. *Id.* at 30:21–31:2. SA
3 Trentlage also testified that after his release from the hospital, Mr. Osman stated that he
4 used that hospital paperwork to apply for passports and other immigration proceedings.
5 *Id.* at 31:3–5. SA Trentlage testified that Mr. Osman explained that he was living in
6 Kenya and applying for passports in that country, but did not have any family members
7 or other identity documents, so the only thing he had with a name on it was the hospital
8 paperwork. *Id.* at 31:7–14. SA Trentlage confirmed that he used the name “Mustaf
9 Arale” on his refugee application and subsequent legal permanent residence application,
10 and noted that although Mr. Osman initially said he was from Somalia, it was later
11 learned that he is from Ethiopia. *Id.* at 31:15–24. SA Trentlage further testified that Mr.
12 Osman stated his father’s name was Abdirahman Osman; however, on his immigration
13 document he gave a different name. Hr’g Tr. 2/27/2019 (Doc. 95) at 31:25–32:6. SA
14 Trentlage also testified regarding a “study guide” that was found during the May 2017
15 search warrant execution, and indicated that Mr. Osman had prepared the document for
16 his wife to study in preparation for immigration proceedings. *Id.* at 32:7–20.

17 SA Trentlage testified that he and SA Cruikshank asked Mr. Osman about his
18 connections with al-Shabaab. *Id.* at 32:21–33:8. SA Trentlage noted that Mr. Osman
19 admitted that he had been approached for recruitment by al-Shabaab, but Mr. Osman said
20 that he was uncomfortable speaking about it. *Id.* at 32:21–33:8, 76:17–77:6. The agents
21 told Mr. Osman that he did not have to speak about anything he was uncomfortable with
22 and changed the topic. *Id.* SA Trentlage further testified that he and SA Cruikshank
23 spoke with Mr. Osman about providing false names and refugees, and Mr. Osman
24 indicated that he believed that it was a very common practice for Somali refugees in the
25 United States to come under fake names. Hr’g Tr. 2/27/2019 (Doc. 95) at 33:9–17. SA
26 Trentlage also testified that Mr. Osman told the agents how he sustained his injuries and
27 gave information regarding a group of ten (10) to twenty (20) al-Shabaab members that
28 were sent overseas to obtain legal status. *Id.* at 34:1–7. SA Trentlage testified that the

1 agents understood the group of al-Shabaab operatives were sent overseas in order to
2 further the objectives of al-Shabaab through planning attacks or bringing other members
3 overseas to foreign countries. *Id.* at 34:8–15. SA Trentlage also testified that Mr. Osman
4 stated that America had been good to him. *Id.* at 36:1–3.

5 SA Trentlage further testified that the agents’ conversation with Mr. Osman lasted
6 approximately two (2) hours. *Id.* at 34:16–18. SA Trentlage also testified that at no time
7 during the interview did Mr. Osman ask the agents to leave, and when Mr. Osman said he
8 did not want to speak about his connection to al-Shabaab, the agents changed the topic.
9 *Id.* at 34:19–35:2. SA Trentlage testified that neither he or Agent Cruikshank made any
10 promises of leniency or dismissal of the charges to Mr. Osman. Hr’g Tr. 2/27/2019 (Doc.
11 95) at 35:3–7. SA Trentlage further testified that neither agent told Mr. Osman that he
12 would be able to stay in the country. *Id.* at 35:8–10. SA Trentlage also testified that they
13 did mention that it was a possibility that Mr. Osman’s family might be able to stay in the
14 country if he provided information, but that this was never promised. *Id.* at 35:11–14,
15 63:20–65:8. SA Trentlage testified that the agents never coerced Mr. Osman to speak
16 and that he seemed willing to provide additional information. *Id.* at 35:15–16, 23–25.
17 SA Trentlage further testified that the agents expected to attempt to verify some of the
18 information after the interview in order to verify its truthfulness, and then continue
19 speaking with Mr. Osman. *Id.* at 35:17–22, 74:24–75:6. SA Trentlage also testified that
20 the FBI had made further efforts to speak with Mr. Osman, but those efforts were
21 unsuccessful. *Id.* at 72:21–73:4.

22 23 **II. ANALYSIS**

24 Defendant seeks suppression of Defendant’s statements, arguing that they were
25 not voluntary due to the promises made by the agents. Def.’s Mot. to Suppress (Doc. 62)
26 at 9–13. Defendant relies on the Supreme Court of the United States’ decision in *Bram v.*
27 *United States*, 168 U.S. 532 (1897) to urge that any inducement by agents was improper
28 and therefore requires suppression. Def.’s Mot. to Suppress (Doc. 62) at 9–13. The

1 Government asserts that because “[D]efendant’s motion does not contend that there was
2 any violation of his rights under *Miranda v. Arizona* when he spoke with agents on June
3 27, 2017[,] . . . it is undisputed that the [D]efendant’s statement was voluntary under
4 *Miranda*.” Govt.’s Response to Def.’s Mot. to Suppress (Doc. 73) at 5. The Government
5 further notes that an agent’s promise to inform the prosecutor regarding cooperation does
6 not render a statement involuntary. *Id.* at 10 (quoting *United States v. Guerrero*, 847
7 F.2d 1363, 1366 (9th Cir. 1988)).

8 *A. Miranda*¹

9 1. In General

10 The Fifth Amendment to the United States Constitution provides that “[n]o person
11 . . . shall be compelled in any criminal case to be a witness against himself[.]” U.S.
12 Const. amend. V. The Supreme Court of the United States has “recognized that custodial
13 interrogations, by their very nature, generate ‘compelling pressures which work to
14 undermine the individual’s will to resist and to compel him to speak where he would not
15 otherwise do so freely.’” *Moran v. Burbine*, 475 U.S. 412, 420, 96 S.Ct. 1135, 1140, 89
16 L.Ed.2d 410 (1986) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602,
17 1624, 16 L.Ed.2d 694 (1966)). “To combat this inherent compulsion, and thereby protect
18 the Fifth Amendment privilege against self-incrimination, *Miranda* imposed on the police
19 an obligation to follow certain procedures in their dealings with the accused.” *Moran*,
20 475 U.S. at 420, 96 S.Ct. at 1140. Specifically, the Court has found the Constitution
21 requires “that a person questioned by law enforcement officers after being ‘taken into
22 custody or otherwise deprived of his freedom of action in any significant way’ must first
23 ‘be warned that he has a right to remain silent, that any statement he does make may be
24 used as evidence against him, and that he has a right to the presence of an attorney, either
25 retained or appointed.’” *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting
26 *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). “An officer’s obligation to administer
27 *Miranda* warnings attaches . . . ‘only where there has been such a restriction on a

28 ¹ *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966).

1 person's freedom as to render him "in custody."'" *Stansbury*, 511 U.S. at 322 (quoting
2 *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

3 **2. In Custody**

4 "Custodial" means taken into custody or otherwise deprived of freedom of action
5 in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("By custodial
6 interrogation, we mean questioning initiated by law enforcement officers after a person
7 has been taken into custody or deprived of his freedom of action in any significant
8 way."). "Two discrete inquiries are essential to the ["in custody"] determination: first,
9 what were the circumstances surrounding the interrogation; and second, given those
10 circumstances, would a reasonable person have felt he or she was not at liberty to
11 terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 116
12 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995). The Ninth Circuit Court of Appeals has further
13 delineated that "[t]o determine whether an individual was in custody, a court must, after
14 examining all of the circumstances surrounding the interrogation, decide 'whether there
15 [was] a formal arrest or restraint on freedom of movement of the degree associated with a
16 formal arrest.'" *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (quoting
17 *Stansbury v. California*, 511 U.S. 318, 322, 144 S.Ct. 1526, 128 L.Ed.2d 293 (1994)).
18 The non-exhaustive list of factors considered by the court in *Kim* included: "(1) the
19 language used to summon the individual; (2) the extent to which the defendant is
20 confronted with evidence of guilt; (3) the duration of the detention; and (5) the degree of
21 pressure applied to detain the individual." *Kim*, 292 F.3d at 974 (citations omitted).
22 Subsequently, the Ninth Circuit Court of Appeals relied on several factors in assessing
23 whether an in-home interrogation was custodial, including: "(1) the number of law
24 enforcement personnel and whether they were armed; (2) whether the suspect was at any
25 point restrained, either by physical force or by threats; (3) whether the suspect was
26 isolated from others; and (4) whether the suspect was informed that he was free to leave
27 or terminate the interview, and the context in which any such statements were made."
28 *United States v. Craighead*, 539 F.3d 1073, 1084 (9th Cir. 2008). "[T]he initial

1 determination of custody depends on the objective circumstances of the interrogation, not
2 on the subjective views harbored by either the interrogating officers or the person being
3 questioned.” *Stansbury*, 511 U.S. at 323, 144 S.Ct. at 1529.

4 Here, it is undisputed that Defendant Osman was not in custody at the time of his
5 discussions with Special Agents Cruikshank and Trentlage. The agents came to his home
6 by agreement, Defendant Osman invited the agents in, and was free to ask them to leave
7 at any time. As such, the conversation was non-custodial and no violation of *Miranda*
8 occurred.

9 **B. Due Process**

10 The Constitution directs that “[n]o person shall . . . be deprived of life, liberty, or
11 property, without due process of law[.]” U.S. Const. amend. V; *see also* U.S. Const.
12 amend. XIV (as applicable to the states). “[C]ertain interrogation techniques, either in
13 isolation or as applied to the unique characteristics of a particular suspect are so offensive
14 to a civilized system of justice that they must be condemned under the Due Process
15 Clause[.]” *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 449, 88 L.Ed.2d 405
16 (1985). Further, “coercive police activity is a necessary predicate to the finding that a
17 confession is not ‘voluntary’ within the meaning of the Due Process Clause[.]” *Colorado*
18 *v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). Indeed, “the
19 voluntariness determination has nothing to do with the reliability of jury verdicts; rather,
20 it is designed to determine the presence of police coercion.” *Id.* at 168, 107 S.Ct. at 522.

21 “A waiver is voluntary if, under the totality of the circumstances, the confession
22 was the product of a free and deliberate choice rather than coercion or improper
23 inducement.” *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998) (citations
24 omitted); *see also Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1140–41, 89
25 L.Ed.2d 410 (1986). The Government “bears the burden of proof in a motion to suppress
26 a statement that the defendant claims was obtained in violation of our *Miranda* doctrine,
27 [and] . . . need prove waiver only by a preponderance of the evidence.” *Connelly*, 479
28 U.S. at 168, 107 S.Ct. at 522 (reaffirming holding in *Lego v. Twomey*, 404 U.S. 477, 92

1 S.Ct. 619, 30 L.Ed.2d 618 (1972)). “The prosecution[, however] does not need to show
2 that a waiver of *Miranda* rights was express.” *Berghuis v. Thompson*, 560 U.S. 370, 384,
3 130 S.Ct. 2250, 2261, 176 L.Ed.2d 1098 (2010). As such, a waiver of a Defendant’s
4 *Miranda* rights may be either express or implied. *Id.*

5 “As a general proposition, the law can presume that an individual who, with a full
6 understanding of his or her rights, acts in a manner inconsistent with their exercise has
7 made a deliberate choice to relinquish the protection those rights afford.” *Berghuis v.*
8 *Thompson*, 560 U.S. 370, 385, 130 S.Ct. 2250, 2262, 176 L.Ed.2d 1098 (2010) (citations
9 omitted). “Several factors to consider are (i) the defendant’s mental capacity; (ii) whether
10 the defendant signed a written waiver; (iii) whether the defendant was advised in his
11 native tongue or had a translator; (iv) whether the defendant appeared to understand his
12 rights; (v) whether the defendant’s rights were individually and repeatedly explained to
13 him; and (vi) whether the defendant had prior experience with the criminal justice
14 system.” *United States v. Crews*, 502 F.3d 1130, 1140 (9th Cir. 2007) (citations omitted).
15 The constitutional validity of Defendant’s waiver is questionable where police conduct
16 “deprives a defendant of knowledge essential to his ability to understand the nature of his
17 rights and the consequences of abandoning them.” *Moran v. Burbine*, 475 U.S. 412, 106
18 S.Ct. 1135, 1142, 89 L.Ed.2d 410 (1986). “Once it is determined that a suspect’s
19 decision not to rely on his rights was uncoerced, that he at all times knew he could stand
20 mute and request a lawyer, and that he was aware of the State’s intention to use his
21 statements to secure a conviction, the analysis is complete and the waiver is valid as a
22 matter of law.” *Id.* at 422-23, 106 S.Ct. 1141.

23 Furthermore, “[a]n interrogating agent’s promise to inform the government
24 prosecutor about a suspect’s cooperation does not render a subsequent statement
25 involuntary, even when it is accompanied by a promise to recommend leniency or by
26 speculation that cooperation will have a positive effect.” *United States v. Guerrero*, 847
27 F.2d 1363, 1366 (9th Cir. 1988) (citations omitted). “The test is whether, considering the
28 totality of the circumstances, the government obtained the statement by physical or

1 psychological coercion or by improper inducement so that the suspect's will was
2 overborne.” *Id.* (citations omitted).

3 Here, Defendant Osman sought to speak with law enforcement and invited them to
4 his home. Hr’g Tr. 2/27/2019 (Doc. 95) at 8:18–9:4, 12:5–23, 21:11–15, 22:8–15, 24:5–
5 11. During the interview, when Defendant Osman said he did not want to speak about a
6 subject, the agents changed the topic. *Id.* at 34:19–35:2. From the outset, Defendant
7 Osman sought a guarantee or promise that he would receive a lesser charge. *Id.* at 26:13–
8 27:7, 54:21–55:13, 61:2–16. The agents responded that the only guarantee or promise
9 that they could make was to speak to the prosecutor and report Defendant Osman’s
10 cooperation in an effort to obtain leniency. *Id.* at 27:4–22, 29:19–30:1, 46:15–25, 47:17–
11 49:10, 52:8–53:17, 55:3–57:3, 57:12–58:20, 59:1–12, 61:2–62:16, 70:8–71:20, 73:18–25,
12 74:16–23, 75:7–76:12. Such promises by agents do not render Defendant Osman’s
13 statement involuntary. *See Guerrero*, 847 F.2d at 1366.

14 Defendant Osman argues that SA Cruikshank’s statements indicating that the
15 possibility for Defendant Osman’s family to stay in the United States, depended upon
16 Defendant Osman speaking with the agents, as coercive. Defendant Osman submitted
17 supplemental authority in support of this argument. In *United States v. Tingle*,² the Ninth
18 Circuit Court of Appeals recognized that “[w]hen law enforcement officers deliberately
19 prey upon the maternal instinct and inculcate fear in a mother that she will not see her
20 child in order to elicit ‘cooperation,’ they exert the ‘improper influence’ proscribed by
21 *Malloy*.³]” *Tingle*, 658 F.2d at 1336; *see also Brown v. Horell*, 644 F.3d 969, 980 (9th
22 Cir. 2011) (recognizing *Tingle* proscription applies equally to paternal relationship with
23 child). The agent in *Tingle* “recited a virtual litany of the maximum penalties for the
24 crimes of which Tingle was suspected, totaling 40 years imprisonment[,] . . . [and said]
25 that Tingle would not see her two-year-old child ‘for a while.’” *Tingle*, 658 F.2d at 1336.
26 In *Brown*, the court noted that Officer Overall “expressly conditioned Brown’s ability to

27
28 ² 658 F.2d 1332 (9th Cir. 1981).

³ *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

1 be with his child on his compliance with her questioning.” *Brown*, 644 F.3d at 981. The
2 court went on to state, “Were this case on direct review, the above analysis would likely
3 lead us to conclude that Overall’s tactics were coercive under *Haynes*, *Lynumn* and
4 *Tingle* and that [Brown’s] admissions should therefore have been suppressed.” *Id.* The
5 matter, however, was before the court on habeas review. *Id.*

6 The relevant dialogue between SA Cruikshank (“IC”), SA Trentlage (“BT”), and
7 Defendant Osman (“MO”) is as follows:

8 IC: Here’s what I would like to see as the outcome. I would like to see
9 you, your wife, and your children stay here, your children go to
10 school here, your wife continue to work, you can continue to work
and you know, make some money. And y-you—

11 BT: Go to school.

12 IC: Yeah, you’re going to school, your—your, you know—

13 MO: That’s possible?

14 BT: Yeah, I mean—

15 IC: That’s possible.

16 BT: What—

17 IC: That’s what I would like to see but, unless we have the conversation
18 that we wanna have, that is not likely at all, okay? But it’s a
19 possibility. You don’t wanna—you don’t wanna throw that away.

20 BT: Possibility—it just starts from a place of us talking, you know? And
21 you don’t have to feel like—you don’t have to tell us everything,
22 right? You don’t have today. You know, we can—we can do this
slowly, we could start from just the base level, right? We can get to
know each other, we can talk a little today—

23 IC: Yeah.

24 BT: —we can talk a little in a few days, you know?

25 IC: Yeah, we can build that trust—

26 BT: Yeah.

27 IC: —to where you—we can prove to you that we’re being honest with
28 you.

1 BT: You know?
2 IC: And that way you can continue to—we—we would rather have a
3 relationship with you—
4 BT: Yeah.
5 IC: —where we continue to talk to you. That is i-it's a big part of what
6 we do, is—is talking to people that have, uh, initially been people
7 that we've looked at for cases, because they've got information that's
8 more important to us than whatever charge we were looking at, at
9 the beginning.
10 BT: A lot of people try—
11 MO: Okay, this charge is—it is for me or all for all of my family?
12 IC: You. But, your wife also is—has been supporting it. So, but right
13 now it—it's just you.
14 BT: But, you understand, the situation can—
15 IC: Yeah.
16 BT: —affect your entire family. So, you know, like what happens can
17 affect everybody. So, what—what would be the—what would be
18 the best outcome in your mind? Like, what—what would you like to
19 happen? What would you like to be the end result of all this?

20 Verbatim Tr. 6/27/2017 Interview, Hr'g Exh. "1" at ALL-772–ALL-773.

21 SA Cruikshank and SA Trentlage focused on Defendant Osman's concern of his
22 family in an effort to get him to talk to them. They did not, however, go as far as
23 investigators in *Tingle* and *Brown*. In those cases, the threat was express—a failure to
24 cooperate would remove Tingle's and Brown's ability to be with their children. SA
25 Cruikshank and SA Trentlage did not threaten that Defendant Osman would not be able
26 to see his children; however, SA Cruikshank did leverage Defendant Osman's desire for
27 his children to remain in the United States. *See* Hr'g Tr. 2/27/2019 (Doc. 95) at 35:11–
28 14, 63:20–65:8. The agents also talked to Defendant Osman about the need for honesty
in developing trust between them and appealed to his sense of community with America.
See id. at 59:13–61:1, 68:20–69:20.

Although a close call, the Court finds that the agents' statements to Defendant

1 were not “sufficiently compelling to overbear his free will and rational intellect.” *Id.* at
2 1367. Based on the totality of the circumstances, Defendant’s statement was voluntary,
3 and his motion to suppress should be denied.
4

5 **III. CONCLUSION**

6 The Court finds that based upon the totality of the circumstances, Defendant
7 Osman’s statement was voluntary and consistent with due process. As such, his motion
8 to suppress should be denied.
9


10 **IV. RECOMMENDATION**

11 For the foregoing reasons, the Magistrate Judge recommends that the District
12 Judge DENY Defendant Mohammed Abdirahman Osman’s Motion to Suppress
13 Involuntary Statement (Doc. 62).

14 Pursuant to 28 U.S.C. §636(b) and Rule 59(b)(2) of the Federal Rules of Criminal
15 Procedure, any party may serve and file written objections within fourteen (14) days after
16 being served with a copy of this Report and Recommendation. No reply shall be filed
17 unless leave is granted from the District Court. If objections are filed, the parties should
18 use the following case number: **CR-18-01584-TUC-RM**.

19 Failure to file timely objections to any factual or legal determination of the
20 Magistrate Judge in accordance with Fed. R. Crim. P. 59 may result in waiver of the right
21 of review.

22 Dated this 30th day of April, 2019.

23
24 
25 Honorable Bruce G. Macdonald
United States Magistrate Judge
26
27
28